

## Women's Labor Rights Rulings in 2001: A Mixed Bag

by Joanna L. Grossman

Over the past year, federal and state courts issued a number of important decisions affecting the rights of working women. A review of these decisions reveals a mixed bag for women's rights. At the Supreme Court level, sex discrimination cases did not figure as prominently as they have in past years, yet the Court handed down a small but meaningful victory, and at least one significant defeat for female employees.

### Sexual Harassment and Employment

The Supreme Court established an important employment precedent this year in *Pollard v. E.I. DuPont de Nemours*.<sup>i</sup> The case arose because Sharon Pollard, an operator in the mostly male hydrogen peroxide department of a DuPont plant, was harassed by her co-workers for nearly a decade. She sued DuPont under Title VII of the Civil Rights Act of 1964, a federal statute that prohibits discrimination on the basis of protected characteristics like race and sex.<sup>ii</sup> She won her case at trial, and the question before the Supreme Court was whether one component of her damages—front pay—should be subjected to a statutory cap.

Pollard was harassed because she was a woman doing what was traditionally considered a man's job. A male operator, equal to her in rank, put a Bible on her desk opened to the passage "I do not permit a woman to teach or have authority over man. She must be silent." A group of male co-workers circulated an e-mail condemning Pollard for participating in Take Your Daughters to Work Day, and others criticized her for attending a company-sponsored support group called the Women's Network. Pollard's co-workers also referred to her using derogatory, gendered slurs, and openly discussed the fact that they did not approve of women working in the peroxide department, coaching softball teams, or doing other "men's work." Pollard's co-workers also directly undermined her ability to do her job—they told male operators not to follow her instructions, set off false alarms in her area, and sabotaged

her projects so as to make it appear that she was incompetent.

One interesting aspect of Pollard's case—though not one the Supreme Court had to address—was that the harassment she experienced was sex-based, but not sexual, in nature. The harassment was a form of gender policing by her co-workers and that, the Supreme Court acknowledged by implication, one that constitutes illegal harassment.

What the Court did have to decide was the meaning of one aspect of the Civil Rights Act of 1991,<sup>iii</sup> legislation that expanded and updated Title VII of the Civil Rights Act of 1964. As originally enacted, Title VII provided for injunctions, attorneys' fees, awards of backpay and "other equitable relief." These remedies are termed "equitable" because they were traditionally awarded by courts of equity, as opposed to courts of law, when two separate court systems existed. The 1991 Act, among other things, permitted successful plaintiffs to obtain "legal" remedies as well—namely, compensatory and punitive damages. But to give employers some protection, it placed a cap on damages based on the size of the employer.

The question in *Pollard* was whether front pay (damages from the date of a judgment of discrimination forward) is legal in nature, and therefore subject to the cap, or equitable, and unlimited. The Court resoundingly found front pay to be uncapped. In fact, this question of statutory interpretation was so easy that the Court ruled unanimously, and handed down an opinion authored by Justice Clarence Thomas ruling for the sexual harassment victim.

The Court's conclusion came in part because courts had interpreted Title VII to allow for front pay even before legal remedies were added in 1991 (and the 1991 cap clearly exempts previously available remedies) and in part because front pay was traditionally awarded by courts of equity rather than courts of law.

And the import of this decision might be significant in a given case, since it opens up the possibility of recouping significant earnings lost due to discrimination. That result makes sense not simply because it correctly applies an arcane legal distinction, but also because of Title VII's basic purposes. Title VII's two main functions are to deter future discrimination and to compensate victims of past discrimination. Both functions would be served by permitting plaintiffs access to an *uncapped* award of front pay.

## Civil Rights and Employment

The Supreme Court decided other cases last term that negatively affect the rights of female employees. In a significant blow to civil rights plaintiffs, the Supreme Court decided *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>iv</sup> Under Title VII, plaintiffs are generally entitled to have their attorneys' fees paid by the other side if they win their cases. But in *Buckhannon*, the Court held that plaintiffs cannot collect such fees if the other side stops discriminating voluntarily, rather than pursuant to a court judgment.

This decision clearly undermines the purpose of awarding attorneys' fees—to encourage individuals to act as private attorneys general to enforce the nation's civil rights laws. Accordingly, it makes it more difficult for civil rights victims, including women who have been sexually harassed, to seek the protection to which the law entitles them.

The Supreme Court also paved a potentially disastrous road for women in *Board of Trustees v. Garrett*.<sup>v</sup> In that case, the plaintiff had been demoted after taking time off to seek treatment for breast cancer. While the demotion violated the Americans with Disabilities Act (ADA), the Court held that the woman's employer—a state government—was immune from suit. Congress did not have the authority, the Court ruled, to abrogate state sovereign immunity when it passed the ADA.

Of course, the *Garrett* ruling, though potentially devastating for the individual female plaintiff, does not directly implicate women's rights more generally. The clear danger, however, is that *Garrett* may clear the way for future holdings severely detrimental to women if it is

extended to mean that federal statutes that protect women cannot be used to sue state governments.

A hopeful sign, however, came a few months later, when the Court declined to decide a case about whether *Garrett* applied to the Equal Pay Act (EPA), a federal statute that guarantees women equal pay for equal work.<sup>vi</sup> In denying certiorari, the Court let stand a federal appellate decision holding that states could be sued under the EPA.

## Pregnancy and Employment

The rights of pregnant working women continue to be litigated. Although the Supreme Court did not decide any pregnancy-related cases last term, lower federal and state courts picked up the slack. In this region, there was one particularly important decision from a Connecticut court, *Thibodeau v. Design Group One Architects*, dealing with the intersection between pregnancy discrimination and the rights of at-will employees.<sup>vii</sup>

The Connecticut decision came as a result of a case brought by Nicole Ann Thibodeau against her former employer. Thibodeau alleged that she was fired because she became pregnant. Her employer claimed, instead, that she was fired due to performance deficiencies.

Thibodeau faced some hurdles in challenging her termination. Because she worked for a very small business, she could not file suit under either federal or Connecticut anti-discrimination statutes, which apply, respectively, only to businesses with at least 15, or at least 3, employees. Moreover, as an at-will employee, Thibodeau, like most American workers, had no contractual rights against discriminatory termination. That means there is no fixed term for the employment relationship, and while employees can quit without reason, they can also be fired without cause: for a good reason, a bad reason, or no reason at all.

As a result, Thibodeau did not bring a statutory or a contract claim, but rather sued for wrongful discharge. She argued that because of Connecticut's general public policy against pregnancy discrimination, even an at-will employee who is not protected by statute against discrimination should be able to bring a wrongful discharge claim if she is fired simply for becoming pregnant.



The trial court rejected Thibodeau's claim out of hand. But the Connecticut appellate court reversed, providing even greater protection against pregnancy discrimination for the women of the state, no matter how small their employer. In siding with her, the appellate court added to a growing list of exceptions to the doctrine of at-will employment that give at-will employees some rights against termination.

The most significant inroad into pure at-will employment is the federal anti-discrimination statute Title VII, which makes it illegal for employers (above a certain size) to fire any employee on the basis of a protected characteristic like race, sex, or religion. In addition, most states, like Connecticut, have enacted Title VII analogs, which are often broader, apply to smaller employers, and sometimes add sexual orientation to the list of protected characteristics. Finally, the Family and Medical Leave Act places an additional limit on employers with more than 50 employees, by guaranteeing job reinstatement to employees who take time off when they have a baby or become seriously ill.

There is no dispute that all of these statutes protect not just employees who work under contract, but also at-will employees, against discriminatory firing. Taken together, they effectively allow employers to fire at-will employees for *no* reason, but not for a *bad* reason. Yet most of these statutory protections do not apply to small employers; rather, most exempt all employers who fall below the minimum number of employees set in the statute.

These minimum-employee requirements are the product of political compromises between civil rights forces and the small business lobby. The theory behind most of them is that small businesses cannot afford, for example, to hold jobs open or hire temporary workers while women take maternity leave. Small businesses have also asserted that they cannot afford the cost of litigating employment discrimination claims. Small, exempt employers, then, retain the right to fire at-will employees for discriminatory reasons.

There are some protections in place for employees who work for small employers, but they are limited to only some forms of discrimination (none, for example, protects

against pregnancy discrimination). Section 1981, for example, is a federal civil rights statute that prohibits race discrimination in the making and enforcement of contracts, including those between employers and their employees. It applies to employers of all sizes, no matter how small. Moreover, according to several recent federal appellate cases, Section 1981 applies to at-will as well as fixed-term employees.

There are also a series of common law exceptions to at-will employment that provide additional protection against termination. There are two types of common law protections against firing for at-will employees: procedural and substantive. The first type involves the imposition of good cause or due process limitations on employers' right of termination. Courts have made use of contract law to provide some of these protections.

For example, many courts have said that at-will employees can sue for wrongful termination when the procedures outlined in employee handbooks are not followed—even though the employees have no underlying right to continued employment—on the theory that the handbooks constitute a type of contract with employees.

Other courts have held that an at-will employment relationship is governed by an implied covenant of good faith and fair dealing, which prevents an employer from firing an at-will employee without cause. This covenant may be implied even where there is not written contract.

There are substantive protections for at-will employees, too. Courts have recognized public policy exceptions to the doctrine of at-will employment to inhibit firing on specific bases. These exceptions are based on the notion that employers should not be able to exercise their right to fire at-will employees if doing so in a particular situation is inconsistent with an important public policy.

Some common public policy exceptions include: protection for older workers against being fired before their pensions vest; protection for whistleblowers against retaliatory firing; and protection for workers who refuse to commit crimes (like perjury, for example) on the employer's behalf. These exceptions place additional limits on the ability of employers to fire at-will employees by allowing them to sue for wrongful discharge.

What the Connecticut appellate court has done in *Thibodeau* is create a new public policy exception to the doctrine of at-will employment for pregnancy discrimination. But what separates this exception from others is that it creates a right where the legislature has expressly *not* created one.

Recall that the Connecticut anti-discrimination law's 3-employee minimum expressly exempts employers with 2 or fewer employees from its prohibition of, among other things, pregnancy discrimination. Yet the effect of the court's ruling is to extend that same prohibition to every employer, no matter how small – thereby virtually writing the small employer exemption out of the statute.

How did the Connecticut court reach that result? It did so by examining the state constitution and various state statutes, and finding therein a general public policy against pregnancy discrimination.

The Connecticut Constitution, unlike the federal Constitution, includes an Equal Rights Amendment. Accordingly, it provides some authority for finding a strong state public policy against sex discrimination, including pregnancy discrimination. *Thibodeau* could not sue her employer directly under the Connecticut constitution, which only regulates state actors, not private employers. But the appeals court still found it relevant as a barometer of state public policy. Likewise, *Thibodeau* could not sue under the state's anti-discrimination statute, which explicitly prohibits pregnancy discrimination but exempts small employers. But the appeals court still found that statute relevant to her case in that it evinced a state commitment to eradicating pregnancy discrimination. In short, the court looked to the motivations behind the Constitution and the statute to articulate a broader state policy of anti-discrimination that could be applied in a common law wrongful discharge suit.

With the *Thibodeau* decision, Connecticut joins a growing number of states that have recognized public policy limits on the doctrine of at-will employment—a trend that may be a loss for employer freedom, but is certainly a victory for women. Perhaps decisions like this one will force people to question why legislatures give small businesses greater latitude to discriminate against their employees in the first place. But just recently the Connecticut Supreme Court decided to review the *Thibodeau*, which leaves its validity in question.<sup>viii</sup>

## Conclusion

In a year without earth-shattering developments in women's labor rights, courts nonetheless produced some important decisions. Key employment cases continue to focus on the problems of sexual harassment and pregnancy, while the standards governing all civil rights claims continue to be fine-tuned. At the Supreme Court level, the composition of the court remains crucial, as many of the important decisions of the last few years have been won or lost by narrow margins. Thus a single new justice appointed by a conservative president could put an end to the victories entirely.

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<sup>i</sup> 532 U.S. 843 (2001).

<sup>ii</sup> 42 U.S.C. 2000e (1994).

<sup>iii</sup> P.L. 102-166 (1991).

<sup>iv</sup> 532 U.S. 598 (2001).

<sup>v</sup> 531 U.S. 356 (2001).

<sup>vi</sup> See *Illinois State Univ. v. Varner*, 226 F.3d 927 (2000), *cert. denied*, 69 U.S.L.W. 3762 (U.S. 2001).

<sup>vii</sup> 781 A.2d 363 (Conn. App. 2001).

<sup>viii</sup> 782 A.2d 1252 (Conn. 2001).